(8)

No. 95-2024

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1996

C. MARTIN LAWYER, III,
*Appellant,*
v.
THE UNITED STATES DEPARTMENT OF JUSTICE, *et al.*,
*Appellees.*

**On Appeal from the United States District Court for the Middle District of Florida**

## BRIEF FOR THE STATE APPELLEES

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## QUESTIONS PRESENTED

Appellant brought suit seeking (a) a declaration that one of the districts in Florida's legislative districting plan violated the equal protection clause, (b) elimination of the challenged plan, and (c) adoption of a new plan that complies with the equal protection clause. With the State's consent, the three-judge district court eliminated the challenged plan and, after a hearing, adopted a new plan. The questions presented are whether the new plan complies with the equal protection clause and whether, because of the mediation process that led to the State's proposal of the new plan, the district court violated the separation of powers and federalism in adopting the new plan.

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**On Appeal from the United States District Court for the Middle District of Florida**

## BRIEF FOR THE STATE APPELLEES

This suit was brought challenging District 21 of Florida's State Senate districting plan as improperly race-based. The complaint, filed by appellant and five other plaintiffs, sought three specified forms of relief: (a) a declaration that the Florida plan violated the equal protection clause, (b) elimination of the challenged plan, and (c) its replacement by a new plan that complies with the equal protection clause. J.A. 11-15. With the consent of the State, and of appellant's co-plaintiffs and all other parties except appellant, the three-judge district court in this case eliminated the challenged plan and, after a hearing, adopted a new plan that it found to comply with the equal protection clause. J.A. 195-209. The state appellees — the State of Florida, the Florida Senate, the Florida House of Representatives, and the Florida Secretary of State — seek affirmance of the district court judgment.

## STATEMENT

### I. Background

The Florida State Senate districting plan that was originally challenged in this lawsuit grew out of the redistricting process and federal-court litigation that followed the 1990 census. *See Johnson v. DeGrandy*, 114 S. Ct. 2647, 2651-52 (1994). On April 10, 1992, acting pursuant to the state constitution's provision for redistricting in the second year after the decennial census (Article III, Section 16, quoted at Appellant's Brief 1a-2a), the Florida Legislature adopted Senate Joint Resolution 2-G (SJR 2G) reapportioning the State's 40 Senate Districts (Plan 267) and 120 House Districts (Plan 268). In accordance with the state constitutional procedure for apportionment after the decennial census, the Legislature's plans were submitted to the Florida Supreme Court. On May 13, 1992, within the tight time constraint set by the state constitution, the Florida Supreme Court approved the plans, but it retained jurisdiction to entertain further objections. *In re Constitutionality of SJR 2G*, 597 So. 2d 276, 285-86 (Fla. 1992); *see Johnson*, 114 S. Ct. at 2652.

The Florida Attorney General then submitted the plans to the United States Department of Justice for preclearance pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. Five Florida counties, including Hillsborough County (which contains the city of Tampa), are subject to the preclearance requirements of Section 5. On June 16, 1992, the Justice Department denied preclearance, objecting to the Senate plan because, despite "'the politically cohesive minority populations in the Tampa and St. Petersburg areas,'" there was no majority-minority district in the Tampa Bay area. *In re Constitutionality of SJR 2G*, 601 So.2d 543, 547-48 (Fla. 1992) (Shaw, C.J., specially concurring) (quoting excerpts from Justice Department's letter denying preclearance); *see id.* at 544; *Johnson*, 114 S. Ct. at 2652 n.2.



The state supreme court, having "retained jurisdiction" over the Article III, Section 16 case "to entertain subsequent objections" to the legislative plans (601 So.2d at 545), thereupon "entered an order encouraging the Legislature to adopt a plan that would meet the objection of the Justice Department." *Id.* at 544. In response, "the Court was advised that the Governor did not intend to convene the Legislature in an extraordinary apportionment session and the President of the Senate and Speaker of the House of Representatives did not intend to convene their respective houses in an extraordinary apportionment session." *Id.* at 544-45. With the Legislature having thus declined the opportunity for action, the state supreme court undertook to redraw the state legislative plan itself. On June 22, 1992, it adopted an amended plan designed to address the Justice Department's objection. *In re Constitutionality of SJR 2G*, 601 So.2d at 544-47; *Johnson*, 114 S. Ct. at 2652 n.2. This was Plan 330.

District 21 of Plan 330 had a black voting age population of 45.0%. The district was composed of urban, low-income communities on or near Tampa Bay — central portions of Tampa (in Hillsborough County), the eastern edge of the Bay running south into Bradenton (in Manatee County), and central portions of St. Petersburg across the Sunshine Skyway (in Pinellas County), and the islands in between — plus two projections off those Bay communities: one meandering east through parts of Hillsborough County and Polk County; the other forming a narrow "finger" running north from St. Petersburg to Clearwater. *See* Br. of Appellant 3a. The Florida Supreme Court observed that, although the black voters in Polk County to the east might have little community of interest with black voters in the Bay area communities in Hillsborough and Pinellas County other than their race, "under the law, commu-

nity of interest must give way to racial and ethnic fairness." *In re Constitutionality of SJR 2G*, 601 So.2d at 546. The Florida Supreme Court said nothing to retain jurisdiction, as the district court in the present case concluded. *See* Order dated Jan. 9, 1995, at 7-8 (R. 30). The United States District Court for the Northern District of Florida also adopted Plan 330 (*DeGrandy v. Wetherell*, 815 F. Supp. 1550, 1558 n.11 (N.D. Fla. 1992), *aff'd in part, rev'd in part sub nom. Johnson v. DeGrandy*, 114 S. Ct. 2647 (1994)), and elections were held under Plan 330 in 1992 and in 1994.

## II. Proceedings Below

### A. *The Complaint*

On April 14, 1994, one and a half years after the first elections were held under Plan 330, appellant and five other plaintiffs filed a complaint challenging, as a racial gerrymander, Plan 330's definition of Florida Senate District 21. They sought a declaration of its invalidity under the equal protection clause, its elimination, and its replacement by a plan for District 21 that would afford equal protection. J.A. 14.[1] The named defendants were the State of Florida and the United States Department of Justice. J.A. 11-12. During the course of the proceedings, the Florida Senate, the Florida House of Representatives, the

[1] The Complaint's prayer for relief — in addition to including the usual final request for fees, costs, and any other appropriate relief — asked that the Court "(a) enter a Declaratory Judgment that the Reapportionment Plan [Plan 330] violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution; (b) enter an Injunction prohibiting the State of Florida from holding any future Senatorial elections based on the 1992 redistricting plan; [and] (c) [e]nter an order requiring the State of Florida to reconfigure the Senatorial Districts in the State of Florida to comport with traditional districting princip[les] of contiguity, compactness, and communities of interest, thereby eliminating the racial gerrymandering which brought about the current senatorial districting plan." J.A. 14.



Florida Secretary of State, District 21 Senator James T. Hargrett, Jr., and Moease Smith, *et al.*, intervened.

### B. *The Remedial Proposal*

In June 1995, while the case was in its pre-trial stages (and after the 1994 elections were held under Plan 330), this Court issued its decision in *Miller v. Johnson*, 115 S. Ct. 2475 (1995), clarifying the standards for assessing claims of race-based districting first articulated in *Shaw v. Reno*, 509 U.S. 630 (1993). In response, the state parties chose to try to avoid further costly and divisive litigation by attempting — along with all of the other litigants — to negotiate a resolution to the case. In July 1995, all of the parties, including appellant, agreed to the appointment of a mediator to seek a voluntary resolution of the suit, reflecting the primary role of state government in legislative redistricting. 7/6/95 Tr. 14; *see* J.A. 196-97.[2] A mediator was appointed. Orders dated July 14 and 26, 1995 (R. 78, 79, 97). At the same time, the court directed the state appellees to file a monthly "report informing the Court of any formal actions initiated by any public official or branch of government regarding Florida's senatorial 'reapportionment plan.'" Order dated July 14, 1995 at 5 (R. 78).[3] Pre-trial proceedings, including summary judgment proceedings, continued while mediation got under way.

[2] At the July 6 status conference, counsel for both the Florida Senate and the Florida House of Representatives indicated that Article III, Section 16 of the Florida Constitution does not apply by its terms to redistricting outside the decennial-census cycle and that it was important, in order for the 1996 elections to run smoothly, for election districts to be settled around April 1996. 7/6/95 Tr. 28-30, 34. (Transcripts are cited herein as "[date] Tr. [page].")

[3] The Florida Senate filed such status reports as directed. R. 121 (Aug. 14, 1995); R. 141 (Sept. 14, 1995); R. 160 (Oct. 13, 1995).

In early September, after several mediation sessions in which appellant participated (*see* R. 138), a "settlement agreement" was filed in the court proposing a new legislative districting plan to replace Plan 330. R. 131. At that point, appellant, who is an attorney, separated himself from his five co-plaintiffs. He objected to the new plan on one ground: he asserted that race was the sole reason for the proposed new District 21's not being wholly contained within Hillsborough County (where appellant lives). R. 138 at 7. With no agreement on the proposed new district from the Florida House of Representatives (which was newly admitted as a party, 9/27/95 Tr. 15), or from appellant, mediation and trial preparations resumed. *Id.* at 32-33.[4]

On October 26, 1995, the court held a status conference, and the mediator declared an impasse. 10/26/95 Tr. 8.[5] Appellant stated to the court that, if Plan 330 were found to be

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[4] At the status conference held on September 27, 1995, the court made specific inquiry, and received specific assurances, as to the authority of the Speaker of the Florida House and the President of the Florida Senate to represent their respective government bodies in the litigation. 9/27/95 Tr. 12-13. The court also referred to an *ex parte* letter by Senator Forman (*id.* at 13), identical copies of which were apparently sent to each of the three judges. No copy was entered in the Clerk's office on the docket, including the one (to Judge Tjoflat) relied on by appellant. *See* Br. of Appellant 8; Br. Opposing Motions to Affirm at 1a. The copy sent to Judge Merryday was specifically sent back by the Clerk's office at the judge's direction. J.A. 16.

At the same status conference, the court again expressed the view that it would look to the Florida House and Senate as an initial matter to fashion any new districting plan. 9/27/95 Tr. 14, 18-19, 21-22.

[5] With appellant present and participating (and not disagreeing), the mediator explained that "no one was excluded at any stage in the proceeding," that even the House had participated before it had intervened as a party, and that in the latter stages "the public was allowed to sit in" and "the press allowed to attend." 10/26/95 Tr. 9-10; *id.* at 11 ("It felt like a school board meeting at times.").



invalid, the Legislature should be given the opportunity to fashion a new districting plan, though, of course, appellant "would not require the legislature to meet." *Id.* at 30, 37, 39. The court explained that in July it had given notice of the court's desire for legislative action, that "there are complications involved in convening the legislature at times other than its constitutionally set time," and that "[i]f the legislature wanted to do it, the legislature could do it." *Id.* at 34.

With mediation complete, and trial looming, the parties continued discussions on their own. *See* 11/2/95 Tr. 6. On November 2, 1995, a "Settlement Agreement" was filed with the district court proposing a new District 21, with ripple effects on a handful of surrounding districts. J.A. 17-21. The proposal was supported by all of the parties — including the State of Florida, the Florida Senate, the Florida House of Representatives, the Florida Secretary of State, the United States Department of Justice, Senator Hargrett, the citizens who had intervened in defense of the original plan, and the plaintiffs who challenged the original plan — except appellant. *See* J.A. 19- 21.

The proposed new districting plan — Plan 386 — included a markedly redrawn District 21. The black voting age population of the new District 21 was reduced from 45.0% to 36.2%. The two extremities of the Plan 330 district, *i.e.*, the eastern extension projecting across Hillsborough County into Polk County and the thin "finger" extending north from St. Petersburg to Clearwater in Pinellas County, were lopped off; and areas adjacent to the urban Tampa Bay core of the district were added to build back up to the required population. The end-to-end distance of the district was reduced by 37% to less than 50 miles; and the outer boundary of the district was reduced by 58%. *See* J.A. 25-26; Br. of Appellant 4a-5a.

At a status conference held the day the new plan was submitted, the consenting parties stated that they were agreeing

"to abandon plan 330, the current plan for District 21" (11/2/95 Tr. 8-9, 10) in order to avoid the "expensive and time-consuming" litigation in an "unsettled" area of law where there were "significant risks" generating "undesirable uncertainty in the electoral process." J.A. 17. The parties stipulated that a *prima facie* case of unconstitutionality existed regarding Plan 330. J.A. 17 ("there is a reasonable factual and legal basis for the plaintiffs' claim"). Calling for a fairness hearing (J.A. 18), the parties' agreement stated that "[t]he plan finally approved by the Court will be used in state Senate elections unless and until the State of Florida adopts a new plan in accordance with federal and state law." J.A. 19.

Appellant objected. He said that he was not objecting to the mediation process (11/2/95 Tr. 16 ("I'm not opposed to either mediation or settlement discussions")), but he insisted that Plan 330's unconstitutionality must be declared as a precondition to adoption of a new plan. *Id.* The court concluded, to the contrary, that "there is no remaining litigable matter affecting the jurisdiction of the court to proceed to a remedial consideration of this controversy." *Id.* at 25; *see* J.A. 198.[6] After noting that "fairness hearing" was "a shorthand notation for something that may be a little bit more complex

[6] At the status conference, appellant did not insist on some more formal "invitation" to state legislative action than had been given. Nor did he ever mention Article III, Section 16, or the Florida Supreme Court's role under that provision.

Without disagreement from appellant, counsel for the Florida Senate reminded the court of his earlier representations about the authority of the Senate President and stated: "I am even more convinced that that is the situation, having been told by the president of the Senate and others in the Senate that the Senate enjoys more than a majority of its members in support of what the president is doing in this case." 11/2/95 Tr. 23-24. Counsel for the Florida House added that the Speaker, by House Rule 2.4, had authority to resolve this litigation. *Id.* at 24-25; *see* J.A. 137-38.



than that" (11/2/95 Tr. 25), the court invited appellant to file his own counterproposal for a remedy. *Id.* at 27. An evidentiary hearing was set for November 20, 1995, and widespread public notice of the hearing was given. *See* J.A. 198, 205; R. 193.

### C. *Submissions Prior to the Remedial Hearing*

1. On November 3, 1995, appellant submitted his own plan, outlining a new District 21 wholly within Hillsborough County. R. 172; *see* J.A. 57, 77. In that submission, he objected to the proposed Plan 386 solely under *Miller*. Appellant acknowledged that, as in his own plan, it is permissible if "race is a factor." R. 172 at 3. But he argued that the proposed Plan 386 subordinated neutral districting principles to race; he relied simply on the facts that the proposed District 21 crossed the Hillsborough County line and had black percentages higher than those of Hillsborough, Pinellas, or Manatee counties as a whole. *Id.* at 2-4.[7]

Appellant also submitted a brief motion asking for partial summary judgment on the invalidity of Plan 330. R. 173 (Nov. 3, 1995). He stated that "he is, as is every plaintiff, entitled to a judicial decision on the merits of his claim." *Id.* at 2. He further stated that declaring Plan 330 invalid would avoid "unnecessary delay" (because Plan 386 was itself invalid) and would allow "the Court to receive evidence from which the Court would be able to fashion its own plan." *Id.* at 2, 3.

On November 15, 1995, appellant submitted a motion to disapprove Plan 386. *See* J.S. App. 21a. That motion was the same in substance as appellant's November 3 motion seeking adoption of his own plan. It made only the *Miller* objection and

[7] Appellant asserted, as well, that the attorney for the Justice Department had made a "statement that the undersigned's proposal was not acceptable to the Department because the percentage of voting age non-Hispanic Black persons (at 22.7%) was not sufficiently high." R. 172 at 3.

relied on the same points about crossing county lines and county-wide racial statistics. *See* J.S. App. 21a-25a.

2. The parties proposing Plan 386 filed a number of affidavits, with maps and statistics and other information, explaining and supporting the proposal as not in fact having subordinated neutral districting principles to race. J.A. 23-154. The main submission was a declaration by John Guthrie, the state Senate's redistricting expert who, with the aid of computers, drafted the proposed district. J.A. 25-125. His evidence documented what the consenting parties had done in order to resolve the allegation that Plan 330 allowed race to subordinate other state districting principles:

- The new plan was designed to make District 21 substantially more compact, by deleting the extremities of the existing district. J.A. 25. In terms of compactness (which has been rejected as a Florida districting principle), the new District 21 is in line with a host of other Florida legislative districts that have no substantial minority population. J.A. 25-26, 60-75. *Cf.* J.A. 57, 77 (appellant's proposed district).
- The plan was designed to meet the one-person, one-vote principle of the Fourteenth Amendment. J.A. 28.
- The plan complied with the contiguity requirement of the Florida Constitution, which allows the crossing of bodies of water — a practice that is common in Florida's legislative districts. J.A. 28, 81-83. Indeed, in the immediate vicinity, House District 55 similarly crosses Tampa Bay. *See* J.A. 59.
- The plan was designed to minimize the disruption of existing constituencies, by that time based on Plan 330, under which two elections had taken place. It ensured that any changes made in even-numbered districts, which had elections in 1994 and would have their next elections in



1998, would be small enough so as not to require special off-cycle elections in 1996. *See* J.A. 25, 28-29.

- The plan's new District 21 maintained a consistent profile of urban residents in the Tampa Bay area, whose socioeconomic characteristics are among the most disadvantaged in the State, even controlling for race. J.A. 30-31, 49-51.[8]
- The plan reflected the political imperative of preserving the existing partisan balance between Republicans and Democrats, so that the plan would be acceptable both to the Republican-controlled Senate and the Democrat-controlled House of Representatives. J.A. 31.
- The plan reduced the black voting-age population of District 21 to 36.2%, ensuring "meaningful participation in the electoral process" of all citizens. J.A. 31; *see* J.A. at 26, 28-29.[9]
- The plan's District 21, in crossing county lines (it covers portions of three counties), is in keeping with common practice — and the deliberate policy view of many Senators — in Florida. J.A. 32-33 & n.7, 45-48.[10] Appellant's own

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[8] A separate filing in support of Plan 386, by the Florida NAACP, attached a declaration of Leon Russell, who noted that, although years before he had "expressed some reservations" about the cohesiveness of minorities in the Tampa Bay area, he no longer had such reservations, in light of the experience of Senator Hargrett's representation of cross-bay populations since 1992. R. 181 at 2.

[9] At the November 2 status conference, counsel for the consenting plaintiffs stated that, while they continued to assert that Plan 330 was unconstitutional, the new plan was valid and that "[w]e believe it is permitted to consider race, and that's one of the things that we have done." 11/2/95 Tr. 20.

[10] Many Senators believe that a county receives better representation when more than one legislator has constituents in the county. J.A. 32 n.7. A total of 31 of Florida's 40 Senate districts cross county lines. J.A. 33.

proposed plan would split previously unified counties. J.A. 32.

A number of other declarations and affidavits supplied additional support for the proposed Plan 386. A state legislative demographer attested that the plan was politically neutral in its changes from Plan 330. J.A. 126-28. An expert explained that statistical voting-pattern analyses showed that "in the Tampa Bay area, black voters are politically cohesive, and non-black voters usually vote as a bloc against black candidates who are the candidates of choice of black voters" (J.A. 129), and that Plan 386 provides black-preferred candidates a reasonable opportunity to win but is not a "safe" district (J.A. 130-32). The House Speaker attested that Plan 386 is "fair to minority voters" and that its adoption "will avoid a costly, time-consuming trial." J.A. 138. A state election official testified to the importance of acting quickly, citing the disruption to the electoral process in 1992 caused by not having district lines settled until July of that year. J.A. 141. And several community leaders testified to the common interests among the linked low-income populations across the Bay. J.A. 144-154.

### D. *The Remedial Hearing*

At the November 20 hearing, with no one challenging the abolition of Plan 330, the court stated: "the posture of the case is we're assuming a case of liability, and so the question

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And under both the challenged Plan 330 and the remedial plan, 19 of Florida's 40 Senate districts are composed of portions of at least three counties. J.A. 45. The proposed District 21's inclusion of parts of three counties — Hillsborough, Pinellas, and Manatee — was consistent with that practice and with redistricting combinations typically used in the affected area of the State. For example, Florida's House plan also includes one district that combines portions of Hillsborough, Pinellas, and Manatee counties and another two districts that each combine portions of Hillsborough and Pinellas counties. J.A. 32.



becomes whether the plan as submitted by the state defendants passes constitutional muster or in any respects is invalid." J.A. 158. Counsel for the Florida Senate again represented (without contradiction) that the President of the Senate has the authority to sign the settlement (J.A. 162) and then explained at length, based on the pre-hearing filings, the rationale behind the new Plan 386. J.A. 163-71. The court deemed Mr. Guthrie's extensive submission to be his direct testimony and invited anyone to examine him (J.A. 171-72; *see also* J.A. 163) — an offer that no one accepted.

Appellant, in response, renewed his request for a ruling on his summary-judgment motion as to Plan 330's validity, but the court rejected the request, explaining, "if we granted your motion, we would be in this precise posture we are in now." J.A. 173. Appellant then turned to the merits of his *Miller* objection to proposed Plan 386. J.A. 175. Appellant presented no new evidence, but relied on the same assertions he had made in his pre-hearing filings: the racial-breakdown statistics and the crossing of county lines, plus an alleged statement by the Department of Justice attorney (in settlement negotiations) that, appellant urged, showed that race had predominated over traditional districting principles. J.A. 175-79, 184-85. Although told, "[y]ou are free to put on any evidence that you have that race was the deciding factor in the fashioning of plan 386" and "[i]f you want to examine Mr. Guthrie, you're free to do so, or call any witness you want" (J.A. 185), appellant called no witnesses to support his objection.[11]

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[11] Although appellant initially suggested a desire to call the various lawyers for the state and federal parties to probe their intent, he did not pursue the suggestion after being pressed on it (J.A. 185-87), and he did not raise any issue in this regard in his jurisdictional statement. Nor did appellant call the mediator, who was present at the hearing.

Only one other person objected to the proposed remedy, former State Senator Helen Gordon Davis, who is not a party to the case. J.A. 188-90. Like appellant, she presented no evidence. Represented by counsel, she conceded that the configuration of the new District 21 "does not look overly bizarre" and that she had "no evidence of discriminatory intent," but she nevertheless contended that, because of the crossing of county lines, "an inference can be drawn that race . . . is the overriding consideration." J.A. 189. In answer to questions from the district court, she acknowledged that crossing of county lines occurs regularly in Florida. J.A. 189-90.

Counsel for the five plaintiffs who agreed to the proposed new plan told the court: "the overriding consideration ultimately in this plan was the issue of disruption to third parties. . . . [The plan] does, we think, represent a community of interests. . . . It was not a race-based district." J.A. 190-91. And the attorney for the Department of Justice told the court: "I never said at any point during confidential mediation sessions or otherwise that race was the overriding factor in the configuration of District 21 and plan 386." J.A. 193.

### III. The District Court's Decision

On March 19, 1996, with the spring preparations for the 1996 election needing to commence, the district court entered an order eliminating Plan 330 and adopting Plan 386, holding that Plan 386 is constitutional under the standard set out in *Miller*. J.A. 195-209. All three judges joined in that conclusion with respect to the new plan.[12] They differed only over whether the court was required to enter a finding that Plan 330 was

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[12] All three judges likewise agreed that "Florida's House and Senate . . . manifested both the authority to consent and actual consent to the terms of the proposed resolution." J.A. 197. *See also* J.A. 206.



unconstitutional as a precondition to adopting Plan 386 as a remedy.

The majority began its analysis by taking note of the special obligation, when presented with a request to enter a decree involving state law and government, to "guard against any disingenuous adventures" by the litigants. J.A. 199 n.2. Beyond taking such care, however, the court concluded that state defendants should not be deprived of the ability "to avert both an expensive and protracted contest and the possibility of an adverse and disruptive adjudication" by a rule insisting on "a public *mea culpa*" or "a dispositive, specific determination of the controlling constitutional issue." J.A. 199-200 & n.2; *see id.* (quoting *Wygant v. Jackson Bd. of Education*, 476 U.S. 267, 290-91 (1986) (O'Connor, J., concurring in part and concurring in the judgment)). The court therefore took pains to ensure that the challenge to Plan 330 not only met the facial substantiality test of federal-question jurisdiction, but was, on the evidence, a factually serious one under the controlling standards of *Miller*, which the court quoted at length. J.A. 202-03.

The court then applied those standards to assess the constitutionality of the proposed Plan 386 to determine if its formation had been "dominated by the single-minded focus" on race that the Constitution proscribes. J.A. 205. It found that "the November 20 hearing produced but two dissenters, plaintiff Lawyer and a former state Senator, both of whom neither presented relevant evidence nor offered germane legal argument." J.A. 205. Contrasting Plan 386 with Plan 330, "which bears at least some of the conspicuous signs of a racially conscious contrivance," the court found that a "constitutional objection to the proposed District 21 is not established. In its shape and composition, proposed District 21 is, all said and done, demonstrably benign and satisfactorily tidy, especially given the prevailing geography." J.A. 205.

The court stressed that it was not to fashion its own plan according to its own preferences. Rather, "absent a constitutional infirmity," the State-proposed plan should be adopted because state governments have wide latitude in balancing the policies that enter into districting plans. J.A. 207. The court found:

> Plan 386 offers to any candidate, without regard to race, the opportunity to seek elective office and both a fair chance to win and the usual risk of defeat — neither of which is properly coerced or precluded by the state, the court, or the Constitution. Candidates should compete and either win or lose based on their talent, their good fortune, and their views. Nothing about Plan 386 is determinative of an electoral outcome — because of race or otherwise.

J.A. 207. The court concluded with "constitutional approval," stating that "Plan 386 passes any pertinent test of constitutionality and fairness." J.A. 207.

Chief Judge Tjoflat wrote a concurrence, departing from the majority on one point only. J.A. 208-09. While joining the unanimous ruling that the proposed remedy is constitutional, he concluded that the district court should render a ruling on the constitutionality of the challenged District 21 as a prerequisite to adopting the remedy. J.A. 209. Judge Tjoflat nevertheless saw no impediment to adoption of the remedial plan. He believed that the record amply supported not only a determination that "the legislature's proposed remedy is constitutional," but also a determination that Plan 330's "District 21, as presently drawn, is the product of racial gerrymandering and thus cannot be squared with the Equal Protection Clause of the Fourteenth Amendment." J.A. 208.



## SUMMARY OF ARGUMENT

Appellant, having obtained the elimination of the districting plan he challenged, Plan 330, must limit his remaining complaint to the new districting plan, Plan 386, that was adopted in its place at the behest of the state government parties and of all of the other parties to the case except him. Contrary to appellant's contention, however, the new plan was properly found by the district court to comply with the equal protection clause under the standards established in *Shaw v. Reno*, 509 U.S. 630 (1993), *Miller v. Johnson*, 115 S. Ct. 2475 (1995), and their successors. The district court's adoption of the plan, moreover, respected all applicable federalism-based limits on federal courts' authority to adopt a new districting plan in a case like this. Appellant's objections to the district court order are accordingly meritless, and the judgment should be affirmed.

I. To trigger strict scrutiny under *Miller*, *Shaw v. Hunt*, 116 S. Ct. 1894 (1996), and *Bush v. Vera*, 116 S. Ct. 1941 (1996), appellant must demonstrate that race played a predominant role, subordinating other neutral districting principles, in the design of the challenged district. In each of those three decisions, this Court affirmed district court findings that the challengers had carried their burden, concluding that there was sufficient evidence to infer that, for certain majority-minority districts, race had been the factor not subject to compromise by the district designers. Here, by contrast, appellant asks this Court for the first time to reverse a district court's finding that the burden of showing race predominance had not been carried. But there is no sound basis for doing so, for the factors underlying the adverse findings in *Miller*, *Shaw*, and *Bush* are missing here.

The newly formed District 21, having a black voting-age population of only 36.2%, is not a majority-black district or even a "safe" district for black-preferred candidates. The new

district is not bizarre in shape or otherwise violative of any neutral districting principles applicable in Florida. Far from involving an "unwavering[]" (*Bush*, 116 S. Ct. at 1955 (plurality opinion)) commitment to race as the factor that "could not be compromised" (*Shaw*, 116 S. Ct. at 1901), the new District 21 clearly embodies a compromise of the racial composition of the earlier version of the district. Appellant's own co-plaintiffs attested that the new district is not race-based, and the evidence of how it was formed shows a mix of legitimate factors at work without race subordinating the other factors. There is no stereotype-based "mere recitation" of communities of interest here (*Miller*, 115 S. Ct. at 2490), but actual shared interests among the urban, Tampa-Bay-area, low-income populations forming the district. And the district was formed through wide-ranging multi-party discussions (including appellant's co-plaintiffs), not by following "'purely race-based'" directives of the Department of Justice. *Miller*, 115 S. Ct. at 2489.

This evidence amply supports the district court's finding. And it cannot be overcome by appellant's attempt to demand race-neutral explanations for each piece of the district in isolation from the rest. This Court has not adopted such an artificial approach, which makes no real-world sense and which, contrary to *Bush*, would effectively trigger strict scrutiny for any accommodation of race. Nor does the crossing of county lines or bodies of water demand separate explanation in a State where those practices are commonplace. In any event, the evidence shows that the State was pursuing a mix of wholly legitimate interests, without race predominating, in preserving in one district the core Tampa Bay urban, low-income areas in the three counties touched by the newly formed District 21. There is thus no basis for reversing the district court's rejection of appellant's challenge to Plan 386 under the equal protection clause.



II. If Plan 386 is itself constitutional, so too was the district court's adoption of it. To begin with, there was nothing improper about the use of mediation, with appellant's consent and participation, to assist the parties' efforts to find common ground. It is irrelevant how a remedial proposal came to be presented to the district court — in this case, it was the result of the parties' discussions after mediation reached an impasse — because the court was independently required to ensure compliance with any legal preconditions to the proposal's adoption in a court order.

The district court did ensure such compliance. It did not interfere with any pending state-court case, for there was none. And it gave the State of Florida a full opportunity to fashion a new districting plan to replace Plan 330 through available lawmaking processes. When the State made clear that the opportunity would not be taken, the district court had done all that was required in order for it properly to go on to adopt the plan, after finding it constitutional, to resolve this case and enable orderly elections to be held.

The state constitutional provision invoked by appellant in this Court (but not in the district court) requires nothing more. On its face, that provision does not apply to the situation presented here: redistricting outside the decennial-census cycle. Moreover, the most that state law requires is an opportunity for legislative action, which the district court here repeatedly afforded. Nor can appellant suggest some requirement of participation by the Florida Supreme Court as a precondition to the district court's adoption of Plan 386, and not only because the cited state constitutional provision is inapplicable here. Appellant made no such suggestion in the district court or in his jurisdictional statement in this Court; he took no steps independently to invoke the jurisdiction of the Florida Supreme Court (which the district court did not block him from doing); and the Florida Supreme Court has, in any event, refused an

attempt to invoke its decennial-census-cycle authority to consider redistricting outside that cycle. There was, in short, no defect of process in the district court's adoption of Plan 386.

Nor can the district court be faulted here for adopting Plan 386 without first adjudicating the constitutional validity of Plan 330. Aside from the absence of this issue from the questions presented in appellant's jurisdictional statement, the threshold difficulty with this contention is that appellant lacks standing to raise it. Appellant would not benefit from the demanded adjudication of Plan 330's validity: either appellant would be made worse off by losing on the validity issue or he would remain where he is today, subject to Plan 386, because nothing about the remedy depended on whether the district court arrived at that stage of the case by assuming or by adjudicating liability. With appellant having obtained the concrete relief of Plan 330's elimination, he is not separately entitled to a declaration of Plan 330's illegality.

In any event, if the Court reaches the issue, it should reject appellant's apparent contention that an adjudication of liability is always a precondition to a federal court's adoption of a decree that displaces state law. Such a rigid rule would impair federalism values, and run counter to the well-accepted role of consent decrees that impose substantial obligations on States (*e.g., Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. 367 (1992)) by depriving States of the important benefits of being able to resolve serious federal claims without incurring the burdens and risks of litigating all cases to the hilt. The federal courts and federal law would themselves be ill-served by a rule mandating extended litigation and discouraging voluntary compliance with federal duties.

At the same time, concerns about the misuse of federal courts to alter state law or practices without a sufficient grounding in federal law can be addressed without appellant's



rigid rule. If the federal court takes steps to ensure that the federal claim is a serious one, not just facially but on the evidence; that it is not being used to accomplish a usurpation of authority; and that it is not entangling itself in the continuing administration of state law — then federalism values would be impaired, not served, by nevertheless depriving States of the ability to resolve their federal-court cases voluntarily. In this case, the district court took these steps, finding the challenge to Plan 330 serious, confirming the state appellees' authority, and leaving the State free to enact a new districting plan at any time. The court thus gave proper respect to federalism limits and properly entered this decree without an adjudication of liability.

## ARGUMENT

The district court's judgment should be affirmed because it grants appellant everything to which he was entitled. At the outset, it is important to note what is not at issue in this Court. Appellant sought elimination of the challenged Senate plan, and he has obtained that relief. J.A. 208 (injunction modifying Plan 330). Although appellant's complaint sought a declaration of Plan 330's illegality, he has properly refrained from now making a demand for such a declaration as an independent claim: having obtained a judgment providing him the requested concrete relief of abolition of Plan 330, appellant lacks any further entitlement to demand a declaratory judgment that what has been eliminated was in fact illegal. *See, e.g., Rhodes v. Stewart*, 488 U.S. 1, 3-4 (1988); *Hewitt v. Helms*, 482 U.S. 755, 761 (1987); *cf. A.L. Mechling Barge Lines, Inc. v. United States*, 368 U.S. 324, 331 (1961) (declaratory judgment is a discretionary remedy that is properly withheld, even if a concrete controversy continues, where "a challenged 'continuing practice' is, at the moment adjudication is sought, undergoing significant modification so that its ultimate form cannot be confidently predicted").

Appellant's concrete interest in this case, and the dispute in this Court, concerns only the districting plan, Plan 386, that was adopted to replace Plan 330. Seeking a different districting plan to replace the one that (with appellant's support) has been discarded, appellant makes two broad objections to the district court's adoption of Plan 386: first, on the merits, that it is a racial gerrymander in violation of the equal protection clause (Br. 34-47); and second, even if the plan is itself constitutional, that the district court violated certain limits on its power, principally federalism limits, in adopting the plan (Br. 21-34). Each of these objections lacks merit. Plan 386 meets constitutional standards and was properly adopted, in full accordance with governing federalism principles.

## I. There Is No Basis for Reversing the District Court's Finding that the New Districting Plan Is Valid Under the Equal Protection Clause

A. Under this Court's precedents, there is no equal protection violation — indeed, no strict scrutiny — just because race is a factor in the shaping of an electoral district. *See Bush v. Vera*, 116 S. Ct. 1941, 1951 (1996) (plurality opinion) ("Strict scrutiny does not apply merely because redistricting is performed with consciousness of race. See *Shaw* [*v. Reno*, 509 U.S. 630, 646 (1993).] Nor does it apply to all cases of intentional creation of majority-minority districts. See *DeWitt v. Wilson*, 856 F. Supp. 1409 (E.D.Cal.1994) (strict scrutiny did not apply to an intentionally created compact majority-minority district), summarily aff'd, [] 115 S. Ct. 2637 (1995)"). Rather, appellant's claim of racial gerrymandering requires that traditional state districting principles were "subordinated" to race as the "predominant" factor in shaping the challenged district. *See Miller*, 115 S. Ct. at 2488; *Bush*, 116 S. Ct. at 1951-52 (1996); *Shaw v. Hunt*, 116 S. Ct. 1894, 1901 (1996) [hereafter "*Shaw*"].



In each of the three decisions reviewing district courts' applications of this standard, *Miller*, *Bush*, and *Shaw*, this Court applied the standard to *affirm* district court findings of race predominance.[13] In *Miller*, 115 S. Ct. at 2488, 2489, the Court recited the "clearly erroneous" standard of review, mirroring the Court's adoption of that standard, for example, for reviewing district courts' vote-dilution findings under Section 2 of the Voting Rights Act in *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986).[14] In all three cases, the Court stressed the district court findings before it and concluded that it lacked a sufficient basis to overturn those findings in the face of strong evidence that the particular majority-black (or in one case, majority-Hispanic) districts were formed with race being the predominant consideration that could not be compromised regardless of traditional districting principles.

In *Miller*, the Court, emphasizing the district court's finding of predominance of racial considerations behind the majority-black district (115 S. Ct. at 2484, 2485), pointed to the powerful evidence supporting the finding. The State had used the ACLU's "'max black'" plan as a basis for its plan (*id.* at 2484); had combined black populations of very disparate socioeco-

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[13] In *Shaw v. Reno*, the district court had dismissed as a matter of law a claim of racial gerrymandering in the formation of a majority-black legislative district. This Court reversed, holding such a claim legally cognizable under the equal protection clause, and returned the case to the district court for application of the articulated standards. 509 U.S. at 658.

[14] In other constitutional voting rights cases as well, this Court has applied a "clearly erroneous" standard of review (*Rogers v. Lodge*, 458 U.S. 613, 622-627 (1982)) and emphasized the special familiarity of district courts with the relevant locality, including traditional districting principles used in the jurisdiction and related geographic factors (*White v. Regester*, 412 U.S. 755, 769-770 (1973)). *Cf. Clark v. Roemer*, 500 U.S. 646, 659 (1991) (local district courts in voting cases are more familiar than this Court "with the nuances of the local situation").

nomic status separated by wide rural areas (*id.*); had followed the Department of Justice's "maximization demands," which were "'purely race-based'"(*id.* at 2489); had subordinated the State's own view of compactness (*id.* at 2489-90); and had put forward a "mere recitation" of "community of interest," not merely unsupported by any tangible evidence but actually undermined by evidence of "the fractured political, social, and economic interests within" the newly formed district (*id.* at 2490). In those circumstances, the Court concluded that the racial stereotyping condemned by *Shaw v. Reno* was amply in evidence, and it affirmed the district court's finding. 115 S. Ct. at 2490.

In *Shaw*, the Court again reviewed a district court's finding that a majority-black district had been formed with race the predominant consideration. 116 S. Ct. at 1899, 1900. Again the Court concluded that there was sufficient basis to affirm the district court's finding; indeed, the State had admitted that race was the "*overriding* purpose" (*id.* at 1901). Although the State had considered other neutral districting principles, the Court explained that it was critical that race had been the factor that "could not be compromised," with other considerations having "[come] into play only *after* the race-based decision had been made." *Id.* at 1901 (emphasis added).

In *Bush*, the Court had before it three districts, two majority-black and one majority-Hispanic. 116 S. Ct. at 1951-52 (plurality opinion). The Court affirmed the district court's finding of racial predominance. *Id.* In explaining why that finding was sufficiently supported, the plurality stressed the district court's finding that the challenged district had "'no integrity in terms of traditional, neutral redistricting criteria.'" *Id.* at 1952. *See also id.* at 1953 (State had "substantially neglected traditional districting criteria"); *id.* at 1959-60 (district court finding of "'utter disregard for traditional districting criteria'"). As in *Shaw*, the plurality emphasized the uncompromising



character of the State's focus on race, concluding that the decision "to create the districts now challenged as majority-minority districts was made at the outset of the process and never seriously questioned" (*id.* at 1953) and that the State had "pursued *unwaveringly* the objective of creating a majority-African-American district" (*id.* at 1955 (emphasis added)).

B. This case is dramatically different from *Miller*, *Shaw*, and *Bush*. Here, appellant would have this Court for the first time reverse a district court's finding that the threshold standard of racial predominance was not met. That standard itself is "a demanding one" for a challenger to meet (*Miller*, 115 S. Ct. at 2497 (O'Connor, J., concurring)), and the burden of justifying reversal of the district court is heavier still (*see id.* at 2488, 2489 ("clearly erroneous" standard)). Neither in this Court nor in the district court has appellant carried his burden, for it was eminently reasonable for the district court to reject the claim of racial predominance in the formation of Plan 386's new District 21.

To begin with, appellant is wrong in asserting that the district court "did not adjudicate the constitutionality of District 21" in the new Plan 386. Br. 35. Appellant points to the court's several statements that deference was owed to the state government in redistricting (J.A. 206-07), but those statements are entirely correct under the very authority touted by appellant elsewhere in his brief (Br. 22-24). The district court made clear that the state government's wide leeway applies only within the limits set by the Constitution. J.A. 206 (deference "yields . . . upon the identification of a constitutional defect"); J.A. 207 (deference applies only "absent a constitutional infirmity"). And, on the constitutional question, the court drew its own conclusion of validity (J.A. 205, 207), having extensively quoted and applied the *Miller* standard requiring proof "'that the legislature subordinated traditional race-neutral districting principles'" to race (J.A. 203). Judge Tjoflat, concurring,

pointedly joined "the majority's conclusion that the redistricting plan that the Florida Legislature has proposed, and that we adopt today, is constitutional." J.A. 209.

The district court's finding should be affirmed because there was ample evidence that race did not predominate over the various non-race reasons for the formation of District 21 in Plan 386 (*see* pages 10-12, *supra*) and there are stark differences from the evidence in *Miller*, *Shaw*, and *Bush*. First, the new District 21 is not in fact majority black. Its voting age population is only 36.2% black. It is not a "safe" district for black-preferred candidates. *See* J.A. 31, 131. In such circumstances, racial predominance, and the message-sending and representational harms identified in this Court's decisions, should be rarely if ever found.

Second, the new District 21 does not violate any race-neutral districting principles applicable in Florida. The district is not bizarre in shape, particularly in the context of Florida legislative districting; and it is fully in line with widespread (and wholly non-race-based) Florida districting practice in crossing county lines and bodies of water, including Tampa Bay. *See* J.A. 25-26, 28, 32-33. Where neutral principles have thus been respected, a finding that race "subordinated" the respected neutral districting principles requires some special, additional proof, since strict scrutiny is not triggered by the mere fact that race is used as a factor in shaping a district. *Miller*, 115 S. Ct. at 2488; *see DeWitt v. Wilson*, 856 F. Supp. 1409, 1413 (E.D. Cal. 1994), *summarily aff'd*, 115 S. Ct. 2637 (1995).

Third, this case does not involve the critical factor identified in *Shaw* and *Bush* as defeating the significance of respect for neutral principles (which itself was hardly well accepted in *Shaw* and *Bush*). In both of those decisions, the Court made clear that the key defect was that race had been the factor that



"could not be compromised" and that other considerations entered the equation only secondarily. *Shaw*, 116 S. Ct. at 1901; *Bush*, 116 S. Ct. at 1953, 1955 (plurality). Here, race indisputably was compromised: the near-majority black voting-age percentage of Plan 330's version of District 21 was significantly reduced in shaping the new District 21 of Plan 386. Appellant's five co-plaintiffs, party to the negotiations that led to Plan 386, asserted that the new district "was not a race-based district." J.A. 191. More generally, the evidence makes clear that a variety of legitimate factors went into the formation of District 21, with no "unwavering[]" (*Bush*, 116 S. Ct. at 1955 (plurality opinion)) priority given to race. *See* pages 10-12, *supra*.

Fourth, this case does not involve a "mere recitation" of "community of interest," let alone one contradicted by evidence of "fractured" socioeconomic groupings within the district and wide separation by rural areas. *Miller*, 115 S. Ct. at 2490, 2484. To the contrary, there is more than recitation, there is evidence, of a genuine community of interest among the residents of the new District 21. The district consists entirely of cohesive urban populations within the Tampa Bay area; and without regard to race, the district is composed of citizens significantly disadvantaged in socioeconomic characteristics. *See* J.A. 30-31, 49-51; *see also* J.A. 144-154. Contrary to appellant's suggestion (Br. 45), there was no mere stereotypical assumption of race-based community of interest at work here.

Fifth, this case does not involve a State's following of a "'purely race-based'" directive of the Department of Justice in forming its district. *Miller*, 115 S. Ct. at 2489. In response to appellant's allegations that a Department of Justice attorney had asserted "that race was the overriding factor" (Br. 14), the attorney informed the district court that he had said no such thing (J.A. 193). Moreover, although Plan 330 had been adopted in 1992 as a result of a Justice Department decision (its

refusal to pre-clear the legislatively enacted plan under Section 5 of the Voting Rights Act), the new Plan 386 was produced by the state appellees after widespread discussions, including discussions with appellant's own co-plaintiffs who, after challenging Plan 330 as improperly race-based, explained to the district court that Plan 386 was not race-based. J.A. 190-91.

C. In the face of these facts, appellant apparently argues that the equal protection clause requires a separate race-neutral explanation for each significant piece of a district, considered in isolation from the district as a whole. Appellant's position would apply even to a district that is far from majority black, which was formed based on neutral districting principles without race predominating in the design, and whose residents share real non-racial communities of interest. This cannot be a proper application of the predominance standard.

*Miller* and *Shaw* do not support such a sweeping standard. When they established, as a necessary (not sufficient) condition for strict scrutiny, that "[t]he plaintiff's burden is to show . . . that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a district" (*Miller*, 115 S. Ct. at 2488; *Shaw*, 116 S. Ct. at 1900), they said nothing to the effect that each piece of a district could be evaluated in isolation from the rest. Both decisions, moreover, went on to find subordination of neutral districting principles to race only in the presence of the other critical factors described above and lacking here.

Appellant's approach makes little real-world sense, because the construction of a district typically is not broken into isolated pieces. The builder of a district, considering a mass of political, geographic, and demographic data, does not add particular blocks of territory without regard for what other territories are being added and the effect on the overall profile of the district. The mix of policies determining the whole of the district affects



the addition of each piece. It is the entirety of the district-wide process that must reflect no subordination of neutral policies to race: the reasons for inclusion of each piece cannot fairly be evaluated in isolation. Indeed, the Court has adopted just such a district-as-a-whole approach in its standing holdings, stating that "a plaintiff who resides in a district which is the subject of a racial-gerrymander claim has standing to challenge the legislation which created that district." *Shaw*, 116 S. Ct. at 1900; *United States v. Hays*, 115 S. Ct. 2431 (1995).

In addition, appellant's broad standard is, at least as a practical matter, incompatible with what a majority of this Court recognized in *Bush*. As the plurality there confirmed, even the "intentional creation of majority-minority districts" does not itself trigger scrutiny (116 S. Ct. at 1951) (plurality opinion). *See also id.* at 1977 (Stevens, J., dissenting); *DeWitt v. Wilson, supra*. But it is hard to imagine how the designers of such a district, as they engage in the piece-by-piece building of the district, could wholly avoid a particularized focus on race at every step of the process. Appellant's position, therefore, would in practice threaten strict scrutiny for every accommodation of race in the shaping of electoral districts, contrary to *Bush* and appellant's own views (*see* page 9, *supra*).

Appellant's somewhat narrower principle demanding a non-race reason for the crossing of county lines is equally unjustifiable here. In Florida, it is commonplace for the districts of both the Florida Senate and the Florida House to cross county lines. *See* J.A. 32-33 & n.7, 45-48. Against this background, when a legislative district crosses a county line (as appellant's own plan for districts other than District 21 would do, J.A. 32), that fact itself furnishes no basis for suspicion of racial stereotyping, or for concern about the sorts of message-sending harms described in *Shaw v. Reno*, 509 U.S. at 647-48. There is accordingly no justification for breaking apart a district into its county-by-county components and applying the racial-

predominance standard to each such component, rather than to the district as a whole.[15]

In any event, there is ample affirmative evidence of the reasons other than race that the new District 21 took its cross-Bay form — evidence that appellant has not countered, having declined the opportunity even to examine the plan's builder, John Guthrie. The aim was to resolve the plaintiffs' challenge to the Plan 330 district by excising its outer projections and compromising on its racial makeup, while maintaining the urban, low-socioeconomic-status character of the Bay-based district, providing realistic electoral opportunities for all voters, and minimizing political disruption, including spillover effects on other districts that would upset the partisan balance of the Legislature or require out-of-cycle elections for even-numbered districts. *See* pages 10-11, *supra*.[16] Race played no predominant role, subordinating other principles, in this design process.

This conclusion stands irrespective of how Plan 330 was created in 1992. Plan 386 created a different District 21, one that reduced the black-voter percentages but preserved the Tampa Bay urban, low-income core of the original district. Moreover, time had created a new reality by 1995. After three years under Plan 330, the State had a legitimate interest in preserving electoral stability by avoiding needless disruption of the political relationships that had developed under that

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[15] Nor does it make sense, as appellant seems to suggest, to compare the racial composition of a low-income urban district to the racial composition of the larger surrounding counties, where populations are anything but homogeneous in distribution.

[16] In particular, both the Manatee and Pinellas County portions of the district are surrounded by even-numbered districts. Absorption of a substantial number of District 21's voters by those districts would have precipitated a call for special out-of-cycle elections there. *See In re Apportionment Law*, 414 So. 2d 1040 (Fla. 1982).



arrangement where it could do so consistent with non-racial communities of interest and otherwise-prevalent districting principles. The use of Plan 330 as a starting point thus caused no taint to attach to Plan 386. No evidence introduced by appellant furnishes a ground for reversing the district court's finding that Plan 386 complies with the equal protection clause.

## II. The District Court Properly Adopted the Districting Plan to Resolve This Case

Independently of his equal protection challenge to Plan 386, appellant has challenged the district court's authority to adopt the plan. His objections along these lines have varied over time. None has merit. If the Court concludes that Plan 386 comports with the equal protection clause, there is no basis for reversing the district court's adoption of the plan.

A. The sole pertinent question presented in appellant's jurisdictional statement objected simply to the district court's "use of mediation, . . . in closed door caucuses." J.S. i (question 2). But, even aside from the acknowledged infirmity that "[t]his issue was not raised below" (J.S. 19), the objection lacks substance. Indeed, it has almost disappeared from appellant's brief on the merits. Br. 33-34.

Appellant consented to and participated in the mediation sessions. 7/6/95 Tr. 14; R. 138; 11/2/95 Tr. 16 ("I'm not opposed to either mediation or settlement discussions."). The mediation sessions were always open to appellant and, after a time, were broadly open to the public.[17] And, in any event, as

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[17] *See* note 5, *supra*; J.A. 205 ("the mediation of this public dispute . . . has occurred in the light of public observation"). The mediator, of course, sometimes talked with one party outside the presence of another to see if differences could be bridged; but even these discussions could have been probed by examination of the mediator at the remedy hearing, which appellant did not request.

shown by the fact that the state parties reached their agreement on the new plan after the mediation process had come to an end, the process by which a proposed remedy came to be presented to the district court is legally irrelevant. No matter how the state officials and consenting parties reached consensus, the district court still was required to comply with any properly invoked requirements applicable to the *adoption* of the new districting plan. Any objection to mediation is thus insubstantial.

B. In the body of his jurisdictional statement, and again in his brief, appellant suggests that the district court's adoption of Plan 386 was improper — even if the plan comports with the equal protection clause — because state-government processes for the adoption of a new apportionment plan were violated. J.S. 10, 16-21; Br. 22-23, 32-34. Even if some or all of this contention is deemed "fairly included" within the scope of the question focusing only on "closed-door" mediation,[18] it lacks merit. The district court did not override state-government processes in adopting Plan 386.

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[18] This Court's Rule 18.3 incorporates for jurisdictional statements the requirements of Rule 14 for petitions for writs of certiorari. Rule 14.1(a) states: "Only the questions set out in the petition, or fairly included therein, will be considered by the Court." This Court has held that presentation of issues in the body of a petition is not a substitute for presentation on the "questions presented" page of the petition. *E.g., Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 114 S. Ct. 425 (1993). To the extent that appellant has suggested "process" defects in the district court's adoption of Plan 386 that are wholly independent of the alleged use of "mediation . . . in closed door caucuses" to arrive at the proposal presented to the district court (J.S. i (question 2)), a stretch is required to find the issues "fairly included" in appellant's second question presented. As noted below (page 35, *infra*), the required stretch reaches the breaking point with appellant's distinct contention that he was entitled, not as a process matter, but as a substantive precondition, to a liability determination with respect to Plan 330.



Any federal court is required to accord proper respect to state sovereign interests before entering a remedial order. *See, e.g., Missouri v. Jenkins*, 495 U.S. 33 (1990). In redistricting cases particularly, it has been the longstanding rule that a federal court should give state legislatures — and state courts if they have an active pending case on the matter — the first opportunity to fashion a new districting plan, while retaining the obligation to create a plan if that opportunity is not taken. *See, e.g., Growe v. Emison*, 507 U.S. 25, 34 (1993); *Connor v. Finch*, 431 U.S. 407, 414-15 (1977). Appellant relies on these principles (Br. 22-24), but he is mistaken in suggesting that they were not followed in this case.

There was no pending state-court redistricting case by the time this case was filed in 1994, let alone by the time the remedial issues arose in 1995. At no point, moreover, did appellant ever suggest a reference to the Florida courts or himself undertake to try to invoke any available jurisdiction of the Florida courts. Unlike in *Growe* and its predecessors, there was no relevant pending state-court proceeding in this case, much less any federal-court interference with such a proceeding.

As for the Florida Legislature, the district court repeatedly recognized that the Legislature should have the opportunity to act. And it gave the Florida Legislature every opportunity to seize the initiative of meeting to fashion a new districting plan, even requiring monthly status reports on that very subject. *See* page 5, *supra*. The opportunity, quite simply, was not taken. In that circumstance, the district court had done everything it was required to do.

With the ordinary requirements of deference to state redistricting processes plainly satisfied here, appellant suggests that more was required in the present voting-rights case because there was a specific state law — Article III, Section 16 of the

Florida Constitution — allegedly being violated by the district court's adoption of Plan 386. Br. 32-34. Nowhere in the district court, however, did appellant make any such argument. On this matter of state law, it is inappropriate to allow the argument to be presented for the first time in this Court, without a ruling by the lower federal courts more familiar with the relevant State's law.

Appellant has in fact incorrectly read the state constitutional provision he invokes. On its face, Article III, Section 16 of the Florida Constitution applies only to legislative sessions in the decennial-census cycle; it simply does not speak to the situation of redistricting outside that cycle. *See* Br. of Appellant 1a-2a. The provision does reflect a general preference for legislative redistricting, but that is the very same principle as is reflected in the decisions of this Court discussed above, and that principle was followed here. Indeed, the Florida Supreme Court has already in effect concluded that state law requires no more. In 1992, after the Justice Department denied preclearance for the original districting plan, the Florida Supreme Court was told by the State that the Legislature would not convene to fashion a new plan, and it treated that declining of the opportunity to convene as fulfilling any state-law obligation of the Legislature. *In re Constitutionality of Senate Joint Resolution 2G*, 601 So.2d at 544-45.

Nor, finally, can appellant suggest that the Florida Supreme Court, rather than the Legislature, was obliged to act under Article III, Section 16. Nowhere in the district court or even in his jurisdictional statement did appellant suggest that the district court could not adopt a remedy without the Florida Supreme Court first being given the opportunity to act; appellant did not ask the district court to issue any order of referral to the Florida Supreme Court; and appellant, though not blocked by any district court order (*compare Growe, supra*), did not take any action on his own to seek relief directly from the Florida



Supreme Court or any other state court. These omissions are hardly surprising. The Florida Supreme Court had said nothing to retain jurisdiction when it adopted Plan 330 in the 1992 case under Article III, Section 16 (*see* page 4, *supra*), and the Florida Supreme Court has declined, when it has not retained jurisdiction over the decennial-census-cycle case, to entertain an independently filed districting challenge outside that cycle. *Cardenas v. Smathers*, 351 So.2d 21 (Fla. 1977).

C. Appellant's remaining objection to the adoption of Plan 386 is that, at least "in the absence of consent of Appellant," he was entitled to a declaration of Plan 330's invalidity as a precondition to the adoption of Plan 386 (even, apparently, if the declaration reflects not an independent adjudication but the defendants' admission). Br. 27; *see* Br. 27-31. This objection, having nothing to do with the *process* by which Plan 386 was adopted, is outside any fair reading of the questions presented in the jurisdictional statement. J.S. i; *see* note 18, *supra*. And the objection is meritless.

1. To begin with, appellant is the last person who should be entitled to block the remedial plan for want of a declaration that the challenged plan, Plan 330, is invalid. Most basically, appellant has no standing to raise this issue because he has no cognizable interest in a favorable resolution. If Plan 386 could not be adopted without a declaration of invalidity, appellant would not benefit regardless of whether such a declaration would be forthcoming. If Plan 330 were declared invalid (based on the defendants' admission or on an adjudication), then Plan 386, given the State's continued endorsement of the plan, would immediately be adopted, as Judge Tjoflat made clear (J.A. 208-09), because nothing at the remedy stage would have changed. Appellant thus would be in the same position as now, as the district court noted (J.A. 173). If Plan 330 were instead *upheld*, appellant would by his own reckoning be *worse* off than he is now: Plan 330 is precisely what he challenged, he

has had that plan abolished, and he cannot now assert that he has an interest in its reinstatement. Appellant thus does not stand to gain from a favorable resolution of the issue he now raises and so lacks standing to press it.

All that appellant demands is a formal declaration, even one based simply on the State's *mea culpa*, that would not improve the concrete effect on him of the judgment he received in his lawsuit. As this Court has made clear, a federal-court litigant has no cognizable interest in such a declaration, independent of the judgment and its real-world concrete effect. *See Hewitt v. Helms*, 482 U.S. at 761. Thus, once appellant received the elimination of Plan 330, the only issues remaining *for him* were the forward-looking ones governing the validity of Plan 386's adoption. Those issues, as explained above, were properly adjudicated against him.

2. In any event, there is no sound basis for the suggested rigid rule of federal equity power that would always require an invalidation of a challenged state law as precondition to its displacement in an otherwise-proper decree accepted by the State. This Court has repeatedly made clear that "[e]quity eschews mechanical rules . . . [and] depends on flexibility." *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946); *see, e.g., Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944) ("Flexibility rather than rigidity has distinguished [equity]."); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982). The very federalism values that appellant invokes counsel against his proposed flat rule and toward a more flexible approach that readily validates the decree in this case.

A federal court's power to enter a decree without determining liability serves important interests: the federal judiciary's interest in resolving cases; the litigants' interest in minimizing needless litigation expense and risk; and federal law's interest in voluntary compliance. *See, e.g., Evans v. Jeff D.*, 475 U.S.



717, 732-34 (1986); *Marek v. Chesny*, 473 U.S. 1, 10 (1985); *Carson v. American Brands, Inc.*, 450 U.S. 79, 86-88 (1981); *United States v. Armour & Co.*, 402 U.S. 673, 681 (1971). It would turn federalism principles on their head if, alone among federal court litigants, state officials were flatly deprived of the ability to resolve their cases without incurring the expense, burdens, and risks of pressing litigation to an adjudication, or even of publicly declaring their own "guilt." *See* J.A. 199-201 (quoting *Wygant v. Jackson Bd. of Education*, 476 U.S. at 290-91 (O'Connor, J., concurring in part and concurring in the judgment)); *see also Johnson v. Transportation Agency*, 480 U.S. 616, 652 (1987) (O'Connor, J., concurring in the judgment). Thus, even when state government defendants are involved and the decree effectively imposes substantial funding obligations on the legislature, a consent decree may be entered without a liability finding where there is a reasonable basis on the facts and in the law for the asserted federal claim. *See Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. 367, 389 (1992) (state officials); *Local Number 93, International Ass'n of Firefighters v. Cleveland*, 478 U.S. 501, 525 (1986) (city). *See also* Note, Federalism and Federal Consent Decrees Against State Governmental Entities, 88 Colum. L. Rev. 1796, 1808 (1988) ("[consent] decrees are usually entered prior to any judicial determination of state violation").

Federalism concerns do distinctly affect the use of the federal courts' equitable power in cases involving state laws. *See, e.g., Missouri v. Jenkins, supra; Milliken v. Bradley*, 433 U.S. 267, 280-81 (1977); *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 298 (1943); *Pennsylvania v. Williams*, 294 U.S. 176, 185 (1935). But those federalism-based concerns do not logically turn on and off, as appellant suggests, depending on whether the plaintiff consents to the decree or, for that matter, on whether there is a liability finding, regardless of whether that "finding" is based simply on the governmental

defendants' "admission" of liability.[19] The federalism constraints must be more substantive than formal: they should ensure that federal courts are not being misused to intrude on state law or practices without a well-grounded basis in federal law, while preserving to States the ability to resolve serious federal claims without requiring States to litigate "every law suit . . . 'to the hilt of the sword.'" *Brooks v. State Board of Educ.*, 848 F. Supp. 1548, 1562 (S.D. Ga. 1994), *appeal dismissed*, 59 F.3d 1114 (11th Cir. 1995).[20]

In this case, federalism concerns could be and were respected, so there was no basis for depriving the State of the benefits of resolving the case by a decree without a liability finding. First, the district court ensured that the lawsuit presented serious risks for the state defendants. It thus made sure, even after the settling parties acknowledged the point (J.A. 17), not only that the complaint was facially substantial (in the sense required for jurisdiction), but also that the *facts* made out a *prima facie* case of invalidity of Plan 330 (J.A. 202-03; *see*

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[19] Once appellant had a fair adjudication of the legality and adequacy of the relief being adopted, his consent was irrelevant either to his due process rights or to the federalism interests relevant to the use of the federal equity power. As for a "liability finding" based simply on the "admission" of state officials, it is unclear why the legitimate concerns about undue federal-court involvement in state affairs would depend entirely on the form of the state officials' "consent." A rigid rule barring decrees without liability findings, followed to its natural conclusion, would easily reach into the process of litigation and bar state officials from stipulations, admissions, or any other measure that relieves the challenger of its burden of proving a violation.

[20] Congress recently enacted a statute (18 U.S.C. § 3626) that imposes special limits on federal-court authority in the context of prison-reform litigation. That statute tends to confirm the absence of comparable limits as part of the general federal equity power. *See also Weinberger v. Romero-Barcelo*, *supra* (limits on equity power must be expressed clearly to abrogate traditional discretion).



*also* J.A. 208-09). Second, the district court took pains to ensure — what appellant never disputed below and does not contest here (*see* Br. of Appellant 32) — that the state appellees' representatives had the authority to resolve this litigation by settlement. *See* J.A. 197, 206; *see also* J.A. 137, 162; notes 4, 6, 12, *supra*; Fla. Stat. § 16.01; *Abramson v. Florida Psychological Ass'n*, 634 So. 2d 610 (Fla. 1994). Finally, and relatedly, the district court created no problems of long-term entanglement or reallocation of authority within state government; to the contrary, its order minimizes federal-court involvement in state affairs. The federal court left the State of Florida free to enact a new districting plan to replace the court-decreed plan at any time — as appellant has never disputed (and the state appellees agree) the State was always free under state law to do. *See* J.A. 19 (settlement agreement: court-adopted plan "will be used in state Senate elections unless and until the State of Florida adopts a new plan in accordance with federal and state law").

This case thus presented real risks of liability and hence a sound basis for federal-court involvement and for state-government voluntary action, with no countervailing threats to federalism values from usurpation of authority or continuing federal-court entanglement. Appellant has cited no precedent of this Court supporting a bar on the entry of a decree in such circumstances. The interests of state governments, federal courts, and federal law would be impaired, not aided, by adopting the rule appellant urges.[21]

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[21] None of the lower-court decisions on which appellant relies seems to present appellant's standing problem of opposing the very law whose abrogation he would seek to undo. On the merits, moreover, they do not go so far as to support appellant's extreme result: barring a voluntary displacement of a state law even without substantial doubt about the substance of the federal-law challenge, without reason to fear a usurpation of authority, and

## CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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without concerns about federal-court entanglement with state institutions. In *Kasper v. Bd. of Election Comm'rs of City of Chicago*, 814 F.2d 332 (7th Cir. 1987), the court held that it was not an abuse of discretion for a district court to refuse to enter a consent decree in a complex voting-practices challenge in the face of too little knowledge about key facts of the case and an apparently serious entanglement problem. In *League of United Latin American Citizens Council No. 4434 v. Clements*, 999 F.2d 831, 842, 844-45 (5th Cir. 1994), *cert. denied*, 114 S. Ct. 878 (1994), the court found that the objectors had standing, ultimately found no federal-law violation, and noted that the Attorney General seemed to be trying to settle "over the express objection of his client." *Id.* at 842. In *White v. Alabama*, 74 F.3d 1058 (11th Cir. 1996), the court reversed the entry of a consent decree on the ground that the decree "violates the Voting Rights Act" (*id.* at 1071 n.42; *see also id.* at 1073). In *Brooks*, 848 F. Supp. at 1553-62, the court, at the behest of parties objecting to the displacement of the challenged practice, applied a flexible, multifactor standard to evaluating a proposed decree and specifically disapproved any requirement that States litigate every lawsuit "'to the hilt.'" In *Perkins v. City of Chicago Heights*, 47 F.3d 212 (7th Cir. 1995), the court, on behalf of parties who opposed the radical restructuring of a municipal government through the abrogation of a host of state statutes by a consent decree involving only city-level officials, seemed to announce a strong bar on decrees without liability, but it provided little clue to how rigid a rule it was announcing and no defense of any rule rigid enough to support appellant's claim in this case.



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